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In the Supreme Court of the United States

OCTOBER TERM, 1967

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRED MEYER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (R. 117–143) is reported at 359 F. 2d 351. The opinion of the Federal Trade Commission (R. 41–103) is reported at C.C.H. Trade Reg. Rep. (F.T.C. Transfer Binder 1961–1963) ¶16,368, but is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1966 (R. 144). By orders of Mr. Justice Douglas of September 30, 1966, and October 24, 1966, the time for filing a petition for a writ of certiorari was extended to and including November 21, 1966. The petition was filed on November 21, 1966, and

was granted on February 13, 1967 (R. 149; 386 U.S. 907). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who resells to retailers competing with the direct-buying retailer violates Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act.[1]

STATUTES INVOLVED

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in pertinent part as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of

[1] A certiorari petition seeking review of certain other aspects of the court of appeals' decision involved in the instant case was filed by Fred Meyer, Inc. (No. 703, 1966 Term). Petitioners there sought to challenge the court below's conclusion that the Commission's findings with respect to knowledge of illegality were supported by substantial evidence, and also questioned the scope of one part of the modified cease-and-desist order. That petition was opposed by the Commission; in addition, the Commission indicated that, should certiorari be granted in No. 703, it desired to preserve a question relating to the scope of the order as well (Pet., No. 789, 1966 Term, pp. 2, 14–15). Certiorari was denied in No. 703, on February 13, 1967. 386 U.S. 908. Accordingly, the only question presented in the instant case is whether the court below improperly restricted the reach of Section 2(d) to the same functional level of competition, and the Court's grant of certiorari was expressly limited to that question (R. 149; 386 U.S. 907).

commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them * * *.

* * * * *

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

* * * * *

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 5(a) of the Federal Trade Commission Act, as amended, 66 Stat. 632, 15 U.S.C. 45(a), provides in part as follows:

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * * *

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

After extensive proceedings, the Federal Trade Commission found that respondent Fred Meyer, Inc., and two of its officers had (1) violated Section 2(f) of the Clayton Act by knowingly inducing certain suppliers of Meyer to grant it discriminatory prices illegal under Section 2(a) of the Act, and (2) violated Section 5 of the Federal Trade Commission Act by knowingly inducing certain suppliers to grant Meyer promotional allowances illegal under Section 2(d) of the Clayton Act; and entered a cease-and-desist order.

Meyer (hereinafter "respondent") operates a chain of retail stores in the Portland, Oregon, area selling groceries, drugs, variety items, and a limited line of clothing. With sales in some thirteen stores exceeding $40 million in 1957, it was, during the relevant period, the second largest seller of all goods in the area (R. 117, 42).

Since 1936, respondent has conducted, through the use of coupon books, a promotional advertising campaign for one month of each year. For each promotion, it prints and distributes a 72-page book, each page of which features a single product and serves as a coupon for the purchase of certain amounts of such products at a specially reduced rate. The campaign involves a large promotional venture: about 140,000 books were used in 1957, and about 120,000 in 1958

(R. 117–118, 44–45). Respondent finances the promotion by charging the supplier of each featured product a basic fee of $350. In addition, some of these suppliers give respondent price reductions based upon volume purchases, replace without charge goods that respondent has sold at special prices, or redeem coupons at an agreed rate (R. 118, 45–47).

The evidence considered in the Commission proceedings related to transactions between the respondent and five of its suppliers, four of which participated in the coupon-book program. The Commission found that the first $350 paid to respondent by each of the four participating suppliers was a promotional allowance within the meaning of Section 2(d), and that the additional benefits granted by these suppliers [2] in connection with the program were price concessions within the purview of Section 2(a). It found that both Sections 2(d) and 2(a) had been violated since these suppliers had not granted the same promotional allowances and price concessions to other buyers of the same products who resold them in the Portland area; and that Section 2(d) had also been violated by a fifth supplier's granting respondent promotional allowances, not connected with the coupon-book program, which were not available to two other buyers reselling in the same area (R. 120–128, 43–54).

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[2] In a subsequent, separate proceeding against one of these suppliers, the Commission found no injury to competition—a requisite for a Section 2(a) violation. It therefore did not rely in the court of appeals on the transactions between that supplier and respondent as part of its case relating to the price-discrimination charge against respondent (see R. 122, n. 5).

Some of the buyers disfavored by the suppliers were wholesalers who resold to retailers competing with respondent in selling to consumers. The Commission ruled that these disfavored wholesalers were, in the language of Section 2(d), "customers competing" with respondent "in the distribution of" the affected products, and were thus protected from discriminatory promotional allowances in favor of respondent, even though respondent was not a wholesaler but a direct-buying retailer (R. 60–66). The Commission further found that respondent and its officers knew or had reason to know that the promotional allowances and price concessions induced from and given by the suppliers were illegally discriminatory (R. 131–138, 74–98), and concluded that they had therefore violated Sections 5 and 2(f), respectively. The Commission's order specified that respondent could induce and receive only those price concessions and promotional allowances granted or offered to wholesalers reselling to respondent's retailer competitors, as well as to competing, direct-buying retailers (R. 115),[3]

[3] The order was in two parts. One part enjoined violations of Section 2(f) of the Robinson-Patman Act, and the other part enjoined violations of Section 5 of the Federal Trade Commission Act. The Section 2(f) part of the order enjoined respondent and its officers from inducing price discriminations between respondent and other customers of the same supplier where respondent is "competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price" (R. 115). The Section 5 part enjoined respondent and its officers from inducing any promotional allowance not offered to other customers of the same supplier competing with respondent, regardless of the functional level on which such competitors operate (*ibid.*; see note 4, *infra*, for the precise language used by the Commission in this part of its order).

The Court of Appeals for the Ninth Circuit upheld the Commission's findings that respondent and its officers had induced (1) price concessions which illegally discriminated against certain other retailer buyers and certain wholesaler buyers, and (2) promotional allowances which were illegal because they were not made available to direct-buying retailers competing with respondent. However, the court below reversed the Commission's ruling that respondent and its officers acted illegally in inducing promotional allowances that were not made available to wholesaler buyers who resell to retailers with whom respondent competes in sales to consumers (R. 124, 128, 130–131). Accordingly, it deleted that language of the Commission's order which would in effect prohibit respondent from inducing and receiving promotional allowances not granted to wholesalers reselling to respondent's retail competitors (R. 143, 146; see note 3, *supra*).[4] In so concluding, the court of appeals relied upon and followed its prior decision in *Tri-Valley Packing Ass'n* v. *Federal Trade Commission,*

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[4] In the Commission's order on the 2(d)–5 violation, respondent was enjoined from inducing and receiving promotional allowances unless the supplier made such allowances available "on proportionally equal terms to all of its other customers competing with [Meyer] in the sale and distribution of such supplier's products, including other customers who resell to purchasers who compete with [Meyer] in the resale of such supplier's products" (R. 115). As modified by the court of appeals, this part of the order more narrowly required respondent to cease and desist from inducing or receiving promotional allowances which were not made available by a supplier "on proportionally equal terms to all of its other customers competing with respondent Fred Meyer, Inc., in the sale of such supplier's products" (R. 146).

329 F. 2d 694, 709, in which it had held that Section 2(d) does not apply if the favored and the disfavored buyers compete on different "functional levels," *e.g.*, if one is a wholesaler and the other a retailer (see notes 13 and 21, *infra*).

SUMMARY OF ARGUMENT

"The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over small ones by virtue of their greater purchasing power." *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168. But the congressional concern in enacting the Act was not limited to the protection of small retailers; rather, the legislative purpose was to protect from discriminatory pricing and related practices the entire distribution system through which goods move from producer to consumer, which includes wholesalers as well as small retailers.

Considered in light of the Act's basic purpose, the Commission's interpretation of Section 2(d) is a reasonable and proper one. Large retailers tend to buy directly from suppliers whereas small retailers generally buy through wholesalers. Any promotional allowance made available to a direct-buying retailer like respondent, but not made available to a wholesaler who resells to retailers in competition with respondent, necessarily subjects the wholesaler-retailer distribution system to competitive disadvantage. Under Section 2(d), as construed by the Commission, the supplier would be required to make the promotional allowance available on proportionally equal terms to the wholesaler, who would then be

in a position to pass this benefit on to his retail outlets, or otherwise participate in the promotional venture, to the benefit of the entire, competing distribution system.

Giving the language of Section 2(d) its reasonable meaning in light of the underlying legislative purpose supports the Commission's view that that provision extends to competition at different "functional levels"—*i.e.*, wholesaler and retailer. That section bars promotional allowances not made available to "all other customers competing in the distribution of" the supplier's products. The wholesalers are "customers competing [with direct-buying retailers] in the distribution of" such products, because the wholesaler is part of the distribution system by means of which the supplier's goods reach the small retailer. Together, the wholesaler and his retail customers are a distribution network in competition with the direct-buying retailer.

The court of appeals' interpretation of Section 2(d), on the other hand, would lead to the anomalous result of prohibiting discrimination between two large direct-buying retailers, while allowing discrimination between a large direct-buying retailer and a competing wholesaler-retailer distribution system, whose need for statutory protection is far more compelling.

That interpretation would also create the further anomaly of permitting discriminatory promotional allowances where price discriminations are forbidden. Section 2(a) prohibits discriminatory pricing in favor of a direct-buying retailer against a wholesaler who

resells to retailers competing with the direct-buying retailer. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55. It is clear that Congress intended Section 2(d) to prevent evasion of Section 2(a) through the use of promotional allowances instead of outright price concessions. Indeed, the absolute ban of the ancillary subsections of the Act, such as Section 2(d), was intended to force discriminatory practices into the form of price discriminations, cognizable under Section 2(a), since they are more easily detected than secret or hidden discriminations involving allowances or services. And the difference in language between Section 2(d) and Section 2(a) lends no support to the court of appeals' interpretation. If anything, that difference indicates that Congress intended the prohibition of Section 2(d) to be interpreted more broadly and its sanction applied even more stringently than that of Section 2(a).

Finally, none of the practical difficulties suggested as inherent in the Commission's interpretation provides sufficient reason for denying wholesalers and small retailers the protection of Section 2(d). Properly considered, against the background of the FTC Guides on Sections 2(d) and 2(e), promotional allowances given to wholesalers will be passed on to the small retailers or otherwise inure to the benefit of the wholesaler-retailer distribution system. Wholesalers will not be able to realize any "windfall" from having such allowances made available to them. No insuperable administrative burdens will be placed on supplier or wholesaler by the Commission's reading of Section 2(d). Under the Commission's flexible approach,

coupled with the statutory requirement of proportional equality, the policy goal of Congress in enacting Section 2(d) can be effectively achieved in a practicable, sensible way.

ARGUMENT

IN THE LIGHT OF THE BASIC CONGRESSIONAL PURPOSE IN ENACTING THE ROBINSON-PATMAN ACT, SECTION 2(d) SHOULD BE CONSTRUED AS PROHIBITING A SUPPLIER FROM GRANTING A PROMOTIONAL ALLOWANCE TO A RETAILER WHO BUYS DIRECTLY FROM THE SUPPLIER UNLESS THE SUPPLIER ALSO MAKES SUCH ALLOWANCE AVAILABLE ON PROPORTIONALLY EQUAL TERMS TO WHOLESALERS WHO RESELL TO RETAILERS COMPETING WITH THE DIRECT-BUYING RETAILER

Section 2(d) of the Robinson-Patman Act prohibits suppliers from giving promotional allowances to customers who distribute their products unless the allowances are made "available on proportionally equal terms to all other customers competing in the distribution of such products." [5] The suppliers in this case distributed their products through two different channels: 1) they sold directly to large retailers, such as respondent; and 2) they sold to wholesalers who, in turn, resold to other retailers. The Federal Trade Commission held that respondent violated Section 5 of the Federal Trade Commission Act by inducing these suppliers to grant it promotional allowances that

[5] Since the court below substantially upheld the Commission's decision and order with respect to 2(a)–2(f) part of the case (see *supra*, p. 7), and the sole question presented for review relates to the scope of Section 2(d), the discussion herein will be focused on the 2(d)–5 aspects of the case.

they did not grant to wholesalers who resold to retailers competing with respondent.[6] The court of appeals reversed the Commission, holding that the disfavored wholesalers were not customers "competing

[6] No serious question can be raised about the correctness of the court below's resolution, in the Commission's favor, of "the question whether the Commission may proceed against a buyer under § 5 of the Federal Trade Commission Act for inducing and receiving a discriminatory promotional allowance * * *", citing, *inter alia*, *Giant Foods, Inc.* v. *Federal Trade Commission*, 307 F. 2d 184 (C.A. D.C.), certiorari denied, 372 U.S. 910; *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104 (C.A. 2), certiorari denied, 371 U.S. 824; and *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92 (C.A. 2) (R. 139). Noting that no case has rejected the result reached by those circuits, the court below indicated that it found "the reasoning of those cases persuasive, and adopt[ed] it" (*ibid.*).

Some ambiguity is presented by certain language used by the court below with respect to its holding on the Section 5 point, however, which implies that that provision, standing alone, reaches the inducing of discriminatory promotional allowances although competition at different functional levels is involved. As a preface to its holding that Section 5 is applicable to inducements of allowances in violation of Section 2(d), the court noted that such "a practice [was] not expressly declared unlawful, as to buyers, by the Robinson-Patman Act, nor to sellers where, as here, the discrimination is among purchasers at different functional levels of competition" (*ibid.*). Considered in context, however, that statement can hardly be read as indicating that the court concluded that Section 5 would apply even where Section 2(d), in its view, would not. All of the cases cited by the court hold only that Section 5 can be applied to the inducing buyer where there has been a violation of Section 2(d) by the supplier, all of the arguments made to the court below were predicated on this assumption, and the court's modification of the Commission's order by deleting the language compelling equality of treatment of wholesalers resolves any doubt about what was intended, despite the apparent breadth of that particular language.

[with respondent] in the distribution" of the suppliers' products. This ruling, we submit, is erroneous and, if allowed to stand, would create a serious loophole in the enforcement of the Robinson-Patman Act.

1. SECTION 2(d) SHOULD BE CONSTRUED BROADLY IN LIGHT OF THE BASIC PURPOSE OF THE ROBINSON-PATMAN ACT

"The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which larger buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168; see also *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 68–69.[7] In Section 2(d) of the Act Congress prohibited the practice of providing "large buyer customers" with "special allowances in purported payment of advertising and other sales-promotional services * * *"—a practice which Congress believed was a "favored medium for the granting of oppressive discriminations." H. Rep. No. 2287, 74th Cong., 2d Sess., pp. 15–16; S. Rep. No. 1502, 74th Cong., 2d Sess., p. 7. But the congressional concern in 1936 was not solely to protect the small retailer. Rather, the congressional focus was on the entire distribution system through which

[7] In *Simplicity Pattern* the Court pointed out that "[t]he Robinson-Patman amendments were enacted to eliminate * * * inequities" such as "advertising allowances" which were paid by the sellers to the large buyers in return for certain promotional services undertaken by the latter which, because they lacked "the purchasing power to demand comparable advantages," placed "the small independent stores * * * at a hopeless competitive disadvantage" (360 U.S. at 69).

goods move from producer to consumer, which, as the Commission noted in *Clairol, Inc.*, F.T.C. Dkt. No. 8647 (June 24, 1966), includes "the traditional wholesaler and his numerous small retailer-customers * * *" (see R. 61–62, for a similar statement). See also *Krug* v. *International Telephone & Telegraph Corp.*, 142 F. Supp. 230, 236 (D. N.J.). Indeed, much of the support for the enactment of the legislation came from representatives of wholesaler interests, speaking both for themselves and for their retailer customers.[8] And Congress used language in Section 2(d)—"all other customers competing in the distribution of such products"—peculiarly appropriate to accomplish this objective of protecting the whole distribution process against discriminatory practices by suppliers that favored large, direct-buying retailers.[9]

[8] The United States Wholesale Grocers' Association was a prime mover behind the Patman bill. The Association's representative during the House committee hearings, Mr. H. B. Teegarden, was a chief spokesman for the bill in tandem with Congressman Patman. In Congressman Patman's words, "Mr. Teegarden wrote this bill." Hearings before the House Committee on the Judiciary on H.R. 8442, H.R. 4995, H.R. 5062, 74th Cong., 1st Sess., ser. 15, p. 9 (1935); see Rowe, *Price Discrimination under the Robinson-Patman Act*, 367 (1962) [hereinafter "Rowe"]. In addition, it is our understanding that leave to file an *amicus* brief supporting the Commission's construction of Section 2(d) will be sought in the instant case by a wholesaler group, Atlantic Coast Independent Distributors Association, Inc.

[9] See R. 60–66, for the Commission's discussion of this point, in which it relied upon the fact that "the statute speaks of competition in the 'distribution' of the products, not merely of competition in their 'resale'" (R. 63), and which it concluded by relying upon "the very terms of the provision in question," saying that the wholesalers, "insofar as they resell to independent retailers sitting alongside [Meyer's] thirteen Portland super-

Considered in the light of this basic purpose, the Commission's interpretation of Section 2(d) is both reasonable and proper. Respondent, like many large retailers, buys directly from its suppliers; many of respondent's retailer competitors, like most small retailers, must buy through wholesalers. Any promotional allowance made available to respondent but not made available to the wholesaler necessarily subjects the interdependent wholesaler-retailer distribution system to competitive disadvantage. As the Commission noted, "if the wholesaler is denied promotional allowances received by respondents, it obviously cannot pass them on to its retailer-customers or use them for the benefit of those customers" (R. 64).[10] Under Section 2(d), as construed by the Commission, the supplier would be

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markets, are 'competing' with [Meyer] in the 'distribution' of the goods in question in every meaningful sense of those two terms" (R. 66).

[10] As the Commission noted, wholesalers who buy directly from the discriminating suppliers are "unquestionably 'customers' of those discriminators" (R. 63). It logically concluded that, "insofar as those wholesalers resell to retailers who, in turn, resell to consumers in competition with [Meyer], the wholesalers are competing with [Meyer] in the 'distribution' of the goods in question" (*ibid.*). In addition, the Commission pointed out that the small, independent retailers "depend entirely" on their wholesalers "for such competitive equality, vis-a-vis the direct-buying chains, as the independent retailers are able to secure. Any competitive disadvantage experienced by the wholesaler himself in buying goods in competition with the chains is necessarily passed on to its retailer-customers. If it pays more for a given product than [Meyer] pay[s], the price it charges the independent retailers will naturally reflect that higher price" (R. 63–64). Concluding on this point, the Commission stated that "[i]n such a market context * * * it ignores economic reality to say that [the] wholesalers are not 'competing' with [Meyer] in the 'distribution' of [the affected] products" (R. 64).

required to make the promotional allowance available to the wholesaler, on terms proportionally equal, as to the form of promotion and the nature and extent of benefits, to those of the arrangement with the direct-buying retailer. Compliance by the supplier would put the wholesaler in a position to pass the benefit on to his retail outlets, or otherwise participate in the promotional venture to the benefit of the entire, competing distribution system.[11]

Read in light of the congressional purpose, the language of Section 2(d) also supports the Commission's interpretation. The wholesalers are indeed "customers competing [with the direct-buying retailer] in the distribution" of the supplier's products because the wholesaler is part of the distribution system by means of which the supplier's goods reach the smaller retailer.[12] Together, the wholesaler and his re-

[11] Questions may be raised as to whether the Commission's approach can effectively ensure the accomplishment of the purposes underlying Section 2(d), and as to certain practical difficulties which might be thought to be inherent in that approach. See Commissioner Elman's dissenting opinion in the instant case (R. 103–106); see also Brief for Respondents in Opposition to Cross Petition, pp. 7–8. A full discussion of this matter is included at a later point (see *infra*, pp. 29–39).

[12] In *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 524–525, the oil company argued that its retail customer was in reality a conduit for the gasoline sold by the oil company and that the oil company was thus in competition with its customer's retail competitors and, therefore, that the oil company could invoke the meeting competition defense of Section 2(b) when it lowered its price to its retail customer to enable him to meet a price charged by his retail competitors. The Court rejected that argument on the ground that it would so broaden the Section 2(b) defense as to render Section 2(a) ineffective (*id.* at 524–525). The statutory provisions and policy considerations involved in *Sun Oil* are obviously quite different

tail customers are a distribution network in competition with the direct-buying retailer. The mere fact that the direct-buying retailer does not buy through wholesalers does not remove it from competition with both the wholesaling and retailing parts of such a competing distribution network. Wholesalers serve as a necessary nexus between suppliers and retailers, and function as a conduit through which products reach the public, and without which efficient distribution would be uneconomic and difficult, if not impossible. As the Commission explained (R. 63):

> * * * It is true, of course, that only the retailer-customers of these two wholesalers com-

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from those here, and acceptance of the view of Section 2(d) here urged would have no effect on the viability of the *Sun Oil* decision. Indeed, in its opinion in the instant case the Commission referred to *Sun Oil* in noting that, "while 'competition' in one form or another is the concern of each of the several subsections of the Act, there is no universal definition of that term that can be applied mechanically to all of its provisions" (R. 64). In other words, the fact that "competition" as used in Section 2(b)'s meeting competition proviso refers solely to "primary-line competition," the Commission pointed out, "is not necessarily controlling in the context of another section" (*ibid.*). While Section 2(b)'s meeting competition defense is presumably applicable in Section 2(d) cases (see *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 301 F. 2d 499, 503–506 (C.A.D.C.); Rowe, 416–420; FTC Guides, par. 14 (App., *infra*, p. 47); see also *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. at 67), the *Sun Oil* decision is wholly consistent with the view (developed *infra*, pp. 26–29) that Section 2(d) should be read at least as broadly as Section 2(a). *Sun Oil* was of course a 2(a) case in which the 2(b) meeting competition defense was restricted to primary-level competition (*i.e.*, at the seller level), although it had been previously established that 2(a) itself was not limited to price discriminations at the same functional level (see *infra*, p. 22); *Sun Oil* was decided against this background (see 371 U.S. at 527, n. 16).

pete with respondents in the direct resale of the goods to consumers. But the statute speaks of competition in the "distribution" of the products, not merely of competition in their "resale." These wholesalers, through their numerous retailer-customers, are seeking exactly the same *consumer dollars* that respondents are after. Every time an independent retailer loses a sale to respondents, the wholesaler who supplied that independent retailer suffers a loss of volume by just that much. And if all of the independent retailers in Portland should close their doors, these wholesalers would necessarily be finished in that market.

2. THE COURT OF APPEALS' NARROW READING OF SECTION 2(d) LEADS TO AN ANOMALOUS RESULT

The court of appeals' narrow reading of Section 2(d)—that it does not cover discriminatory promotional allowances where the disfavored wholesaler and the favored direct-buying retailer are not competing with each other on the same functional level, in the sense that they directly serve the same customers—disregards the principal purpose behind the enactment of the Robinson-Patman Act, and leads to an incongruous and anomalous result. According to that interpretation, Section 2(d) would forbid discrimination between two large direct-buying retailers, but would allow discrimination between a large direct-buying retailer and a competing wholesaler-retailer distribution system—even though the latter's need for the protection of the section is far more compelling.[13]

[13] In its opinion in *Tri-Valley Packing Ass'n*, which the court of appeals followed in the instant case (see *supra*, pp. 7–8), the Ninth Circuit had relied upon a prior Commission decision, *Atalanta Trading Corp.*, 53 F.T.C. 565, reversed on other grounds,

As the Commission stated in rejecting the interpretation later adopted by the court below (R. 87):

Atalanta Trading Corp. v. *Federal Trade Commission*, 258 F. 2d 365 (C.A. 2), as supporting the proposition that Section 2(d) applied only where there was competition at the same functional level, and concluded that a 2(d) violation could be shown only by reliance on the "indirect customer" doctrine (see note 23, *infra*), which it found inapposite (329 F. 2d at 709). However, the Commission hardly can be said to have squarely faced and definitively resolved this statutory interpretation question in *Atalanta*. Although in the hearing examiner's findings of fact, which were adopted by the Commission, there is a statement that "customers [which] were strictly wholesalers who resold to retailers * * * were therefore not in competition with [the direct-buying retailer inducing the allowances]" (53 F.T.C. at 566)); the Commission's order simply enjoined the supplier from granting allowances unless made available equally "to all other customers competing in the distribution or resale of such products" (*id.* at 573), and there was no specific discussion of this question in the Commission's opinion. Reliance by the Ninth Circuit could more appropriately have been placed on the Commission's decision in *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, where the Commission in fact faced and discussed the question whether Section 2(d) applies only to competition at the same functional level. Although holding that cigarette wholesalers and vending-machine operators do not compete in the distribution of cigarettes within the meaning of Section 2(d) (56 F.T.C. at 250–253), the Commission noted that it "hesitate[d] to adopt [a different] interpretation * * * without more convincing evidence" (*id.* at 252). Citing the absence of record support for a 2(d) violation under the circumstances, the Commission concluded by stating (*ibid.*): "There is no necessity, therefore, to decide whether a seller need make its promotional allowances available only to those of its customers who are operating at the same functional level." Commissioner Kern dissented, characterizing the Commission as having decided that Section 2(d) applied only to competition at the same functional level, and asserting that such a conclusion was unnecessary and unwise (*id.* at 253–257)).

But these two somewhat ambiguous decisions did not constitute the full background of Commission interpretation of the

* * * [I]n a geographical market served by, say, two direct-buying "chains," and one whole-

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reach of Section 2(d) against which the Ninth Circuit decided *Tri-Valley*. A full year prior to the decision in *Tri-Valley* the Commission had decided the instant case, in which it gave thorough consideration to the varying arguments as to the applicability of a functional-level test under Section 2(d) and concluded, after an extensive discussion, that the underlying policies of the Act required a broad reading of the scope of that section (see R. 60–66). In reaching this result, the Commission found it necessary to reject the conclusion reached in *Liggett & Myers*, and instead accepted the views stated in Commissioner Kern's dissenting opinion in that case and by the district court in *Krug* v. *International Telephone & Telegraph Corp.*, 142 F. Supp. 230, 236 (D.N.J.) (R. 66). Although the Commission's decision in this case was rendered in March 1963, and the Ninth Circuit's decision in *Tri-Valley* was not handed down until March 1964, there is no mention of or reference to that earlier decision in the court's opinion. This is in part explained by the fact that no question as to the scope of Section 2(d) was thought to be involved at the Commission level in that case, since the Commission viewed the case as involving customers competing on the same functional level (see *Tri-Valley Packing Ass'n*, 60 F.T.C. 1134, 1156). The Ninth Circuit disagreed, however, and concluded that different functional levels were involved as to some of the favored and disfavored customers, and thus found it necessary to reach the question which the Commission had not considered and had therefore not briefed or argued in the court of appeals.

Thus, the Commission's pre-*Fred Meyer* view of the scope of Section 2(d) was hardly a firmly fixed one. Certainly no definitive view was expressed in *Atalanta*, the only Commission decision cited by the Ninth Circuit in *Tri-Valley*, although the instant case had been decided by the Commission some twelve months earlier, and there the Commission had specifically focused on and resolved the 2(d) question. Nevertheless, despite the weak underpinnings of *Tri-Valley*, which were pointed out to the court below, that court determined not to reconsider its holding in *Tri-Valley* in the instant case (see note 21, *infra*). See generally Note, 35 Geo. Wash. L. Rev. 415, 416 (1966).

saler with 100 retailer-customers, a supplier who gave a promotional allowance to Chain A would not be required by Section 2(d) to give it to either the wholesaler or the 100 independent retailers who buy from it, but would have to give it to Chain B. This would mean, of course, that the protection of Section 2(d) is accorded to those who presumably have the market power to take care of themselves (competing "chains"), but denied to those who, as the instant record clearly shows, need its protection very badly indeed (R. 62).[14]

As a remedial statute directed toward certain abusive practices which, without statutory regulation, had developed, the Robinson-Patman Act should be construed against the background of the circumstances which led to its enactment. Under the result reached by the court below, however, the important public policy goal which that legislation was intended to serve is substantially ignored, insofar as Section 2(d) is concerned.

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[14] Moreover, when a retailer who buys through a wholesaler also has certain direct dealings with the supplier (such as having the supplier ship him products directly), the retailer is already protected under Section 2(d). See *Tri-Valley Packing Ass'n* v. *Federal Trade Commission*, 329 F. 2d 694, 709 (C.A. 9); *Kay Windsor Frocks, Inc.*, 51 F.T.C. 89, 95–96 (developing the "indirect purchaser" or "indirect customer" doctrine; see also note 23, *infra*). The Commission's interpretation of Section 2(d) here would merely extend its protection to situations where retailers buy through wholesalers and do not deal directly with the supplier in any way. See *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104, 109–110 (C.A. 2), certiorari denied, 371 U.S. 824.

Acceptance of the court of appeals' interpretation would also create a serious inconsistency within the Robinson-Patman Act itself. It has long been established that Section 2(a) of that Act (dealing with *price* discrimination) prohibits discriminatory price concessions in favor of a direct-buying retailer against a wholesaler who resells to retailers competing with the direct-buying retailer, despite the fact that they may be regarded as competing on different functional levels. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55.[15] A discriminatory promotional allowance is but another form of price discrimination. To allow the latter while forbidding the former is quite anomalous—particularly when Congress made quite clear its intent to have Section 2(d) prevent evasion of Section 2(a)'s prohibition through the use of promotional allowances instead of outright price conces-

[15] In *Morton Salt* the Court considered and rejected a criticism that the Commission's order "bars respondent from selling to a retailer at a price lower than that charged a wholesaler whose customers compete with the retailer" (334 U.S. at 55). Noting that "Section 2(a) of the Act specifically authorizes the Commission to bar discriminatory prices which tend to lessen or injure competition with 'any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them'," the Court concluded that the language of that provision plainly supported the Commission's order (*ibid.*). *Morton Salt* has been consistently construed, by courts and commentators, as having definitively settled that Section 2(a) extends to competition at different functional levels. See, *e.g.*, *Tri-Valley Packing Ass'n* v. *Federal Trade Commission*, 329 F. 2d 694, 697–698 (C.A. 9); *Krug* v. *International Telephone & Telegraph Corp.*, 142 F. Supp. 230, 235 (D.N.J.); Rowe, 175.

sions.[16] See 80 Cong. Rec. 6282, 9418 (remarks of Congressman Utterback, chairman of the Senate-House conferees, and Senator Logan, Senate manager of the bill); *Krug* v. *International Telephone & Telegraph Corp.*, 142 F. Supp. 230, 236 (D.N.J.); *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 68; Rowe, 365.[17]

Indeed, it seems plain that Congress intended, by the interrelationship of Section 2(a) and Sections

[16] In the instant case the Commission noted an attempt by respondent to evade the prohibition of Section 2(a) by claiming that the discriminatory price concessions were in reality promotional allowances and, thus, according to the interpretation of Section 2(d) later adopted by the court of appeals, not prohibited anywhere in the Act (R. 65–66). That contention was rejected by the Commission, and its determination in this regard was upheld by the court below, which concluded that the Commission properly characterized some aspects of the various transactions as price concessions and others as promotional allowances (R. 128–130).

[17] See also *P. Lorillard Co.* v. *Federal Trade Commission*, 267 F. 2d 439, 443 (C.A. 3), certiorari denied, 361 U.S. 923, where the court stated that the purpose of Section 2(d) "was to eliminate all discriminations under the guise of payments for advertising or promotional services, and Congress employed language that would cover any evasive methods"; *State Wholesale Grocers* v. *Great A.&P. Tea Co.*, 258 F. 2d 831, 837–839 (C.A. 7), certiorari denied *sub nom. General Foods Corp.* v. *State Wholesale Grocers*, 358 U.S. 947.

2(c),[18] 2(d) and 2(e),[19] to prevent circumvention of the general prohibitions of Section 2(a) by the use of alternatives for price concessions. As noted by the Court in *Simplicity Pattern,* 360 U.S. at 68, n. 12, "During the congressional debates on the bill, there were continual references to the subsection (c), (d) and (e) practices as 'secret' [or hidden] discrimina-

[18] See *Biddle Purchasing Co.* v. *Federal Trade Commission,* 96 F. 2d 687 (C.A. 2), certiorari denied, 305 U.S. 634, in which the court held that Section 2(c) of the Act (dealing with brokerage fees) was designed to prevent the circumvention of the prohibition of Section 2(a) by the use of discriminatory brokerage fees instead of outright price concessions. See also *Federal Trade Commission* v. *Henry Broch & Co.,* 363 U.S. 166, 169.

[19] It seems plain beyond doubt that Section 2(d) (allowances) and 2(e) (services or facilities) were intended as companion provisions, directed toward different aspects of the identical problem—seller discrimination among buyers on grounds other than price in connection with advertising or promotional programs. The latter applies where a supplier actually furnishes services or facilities, the former where money is provided to accomplish the same result. Such an approach to 2(d) and 2(e) was taken by both congressional committees, and had been the consistent view of the courts, the Commission, and the commentators. *E.g., Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission,* 301 F. 2d 499, 502 (C.A.D.C.) Rowe, 390–391. Despite some differences in the language of the two subsections—this Court's admonition in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61, 65, that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act * * *" should be kept in mind—it is only logical that 2(d) and 2(e) be construed as having the same scope. No case has definitively concluded that 2(e) is restricted to competition at the same functional level. Indeed, the cases seem to point in the opposite direction, and tend to support a similar reading of 2(e)'s scope as was given to 2(d) by the Commission in the instant case. In *Elizabeth Arden, Inc.* v. *Federal Trade Commission* 156 F. 2d 132 (C.A. 2), certiorari denied, 331 U.S. 806, the Second Circuit upheld a Commission order

tions." Since such practices are more difficult to perceive than outright price concessions, it was the congressional purpose in enacting those provisions to force sellers "to confine their discriminatory practices to price differentials, where they could be more readily detected * * *" (*id.* at 68). Promotional allowances are of course but an indirect, and more sophisticated, form of price discrimination. Congress could hardly have intended to sanction under Section 2(d) the very type of discrimination that it prohibited as a price concession under Section 2(a), if accomplished directly. Yet that is the plain effect of the court of appeals' construction of Section 2(d), for, while refusing to apply 2(d) to competition at different functional levels, it plainly recognized that 2(a) has consistently been so applied (R. 131, 135).[20]

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which related to competition at different functional levels—wholesaler and retailer—where the evidence showed that the seller "sold to retailers directly and also indirectly through wholesalers or jobbers" (156 F. 2d at 135). Although this holding may be regarded as simply involving an application of the "indirect purchaser" doctrine, Commissioner Elman, in his dissenting opinion in the instant case, read *Elizabeth Arden* as supporting, by analogy, a broad view of the scope of Section 2(d) (R. 104–105). It would indeed seem quite anomalous, considering the close relationship between Sections 2(d) and 2(e), if a seller could discriminate at different functional levels if he were giving allowances but not if the promotional or advertising program involved his furnishing of services or facilities. They are parallel provisions, and should be construed *in pari materia*. See *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. at 67–69.

[20] In its earlier decision in *Tri-Valley Packing Ass'n.*, relied on for its decision on the 2(d) point in the instant case, the Ninth Circuit explicity noted that 2(a) applies to price discrimination affecting competition at different functional levels (329 F. 2d at 697–698); see note 15, *supra*.

Admittedly, the language of Section 2(a) and Section 2(d) is not identical.[21] Section 2(a) prohibits discriminations in price "between different purchasers" when "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly * * * or to injure * * *competition with any person who either grants or knowingly receives

[21] No explicit reliance was placed by the court below on this difference in language. Rather, the court simply stated that its decision in *Tri-Valley Packing Ass'n* "made it clear that competition at the same functional level must be shown" (R. 124), and that the question "whether a 2(d) violation may exist where the favored and nonfavored customer inhabit different functional levels, was settled in Meyer's favor" in that earlier case (R. 128). Declining to "reconsider" its decision in *Tri-Valley* "after so short a time," the court below rejected the arguments, *inter alia*, that "the result [in that case] was plainly contrary to the language of the Clayton Act and other than that intended by Congress when it passed the Robinson-Patman Act, and [that] the effect of the case was to immunize a practice intended to be stamped out by that legislation, specifically, the bringing to bear of the economic power of the chains upon suppliers to wring from them prices lower than smaller and less powerful unorganized retailers can extract" (R. 131). It stated that the issue as to the scope of Section 2(d) was "considered at length" in the earlier case, that the congressional intent "is not as clear" as the government asserts, and that "no concrete showing of any increase in abuse by large buyers of their inherent power" had been made (*ibid.*).

Nor was there any discussion of the difference in language between Sections 2(a) and 2(d) in the Ninth Circuit's opinion in *Tri-Valley*. There the court simply stated that "the underlying purpose of Section 2(d) * * * is to require sellers to deal fairly with their customers who are in competition with each other, by refraining from making allowances to one such customer unless making it available on proportionately equal terms to the others" (329 F. 2d at 708), and concluded that no violation of Section 2(d) was shown since the various wholesalers and retailers involved were not in "functional competition" (*id.* at 709–710).

the benefit of such discrimination, or with customers of either of them." Section 2(d) prohibits granting a "customer" a promotional allowance "unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products." But this difference in language does not justify the result reached by the court of appeals. It simply means that to attack successfully a practice under Section 2(a) the Commission must show 1) a discrimination (in price) and 2) certain anticompetitive effects; while to prevail under Section 2(d) it need only show a discrimination (in providing promotional allowances).[22] Thus, the difference in language demonstrates, if anything, that Congress wished the prohibition of Section 2(d) to be interpreted more *broadly,* not more narrowly, than

[22] As the Commission noted, while Section 2(a), unlike Section 2(d), "specifically describes the several levels of 'competition' to be protected (competition with the giver and the receiver of the lower price, 'or with customers of either of them'), that description sets forth not the elements of a price discrimination—which 'is merely a price difference', *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960)—but the 'effects' that must appear before the 'discrimination' will be deemed harmful enough to warrant the laying on of the laws [sic] restraining hand. Hence that language, although it supported the Court's conclusion in *Morton Salt*, *supra*, that the 'difference' between the price charged the favored retailer and the nonfavored wholesalers amounted to a price 'discrimination', was not essential to it. The same result would doubtless have been reached if the draftsmen of Section 2(a), while retaining its present description of the offense of 'discrimination', i.e., 'discriminate in price between different purchasers', had made it a per se provision like Section 2(d) and thus omited completely all reference to the three levels of competition at which injury can occur" (R. 64–65).

that contained in Section 2(a), and that its sanction be more *stringently,* not more *leniently* applied (cf. remarks of Congressman Utterback, 80 Cong. Rec. 9418).

Indeed, as noted earlier (*supra,* pp. 23–25), the essential purpose behind making the prohibitions of the ancillary subsections—2(c), 2(d), and 2(e)—sweepingly absolute in nature and the violations thereof *per se* ones was to drive discriminatory practices into the form of direct discriminations based on price, cognizable under Section 2(a), thus making them easier to identify and prevent. Consistent with this purpose, and with the difference in language between 2(a) and 2(d), Section 2(d) should be applied to every discrimination between customers actually competing in the "distribution" of the affected products, without regard to the functional levels at which such customers operate.[23]

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[23] Respondent contends that the Ninth Circuit's reversal rests also on the separate ground that the Commission had failed to show that the supplier's products could be traced to the shelves of any of the wholesaler's retail customers who were in competition with respondent. Brief for Respondents in Opposition to Cross Petition, pp. 8–9. Although there is some confusing language in the opinion to support this construction (R. 124–125), upon closer inspection it is clear that the court meant only that, since the products could not be traced, the retailers were not entitled to the protection of Section 2(d) as "indirect customers" of the supplier (R. 124–125). According to the "indirect customer" doctrine, a retailer buying from a wholesaler but having direct contacts with the supplier is a "customer" of the supplier within the meaning of the word in Section 2(d). *Tri-Valley Packing Ass'n* v. *Federal Trade Commission,* 329 F. 2d 694, 708–710 (C.A. 9); see generally Rowe, 398–399. The court seems to have read its own opinion in *Tri-*

3. UNDER THE COMMISSION'S CONSTRUCTION, SECTION 2(d) CAN BE EFFECTIVELY APPLIED, IN A PRACTICABLE MANNER, TO ACCOMPLISH THE STATUTORY PURPOSE

Respondent has urged (Brief in Opposition to Cross Petition, No. 789, 1966 Term, pp. 7–8) that the Commission's construction will lead to certain practical difficulties. Based upon the mistaken assumption that only the wholesaler's retailer customers are intended to receive the allowances, participate in the promotional program, and derive the benefit therefrom, respondent argues that the Commission's construction, instead of preventing a competitive disadvantage, would "really result in a windfall to the wholesaler," who cannot be compelled to pass the allowances on to his retailer customers.[24] Respondent also points out

Valley as holding that tracing was necessary to establish the "indirect customer" relationship (see 329 F. 2d at 708).

In any event, it is clear that the court below did not intend to upset the Commission's finding of the necessary competitive relationships between respondent and the retailers buying from the wholesalers. Nowhere does the court attack the Commission's carefully reasoned conclusion that there was a high probability that a substantial proportion of the suppliers' products reached the shelves of retailers buying through the wholesalers and competing with respondent (R. 66–68). Moreover, the court reversed only the Commission's holding that the suppliers had violated Section 2(d) (R. 130–131): Had the court found no competitive relationship between the wholesaler's retailer customers and respondent, it would have been bound to overturn as well the Commission's holding that these suppliers had violated Section 2(a).

[24] Commissioner Elman's dissent was based on the fact that the Commission's order does not require the wholesaler to pass on the allowances to his retailer customers (R. 104). He would have required the suppliers to bypass their customers, the wholesalers, and make the allowances available directly to the wholesaler's retailer customers who compete with respondent in the sale of the products to consumers (R. 104–106).

that Section 2(d) requires only that the allowances be made "available" to competing customers, and asserts that the wholesaler may determine not to accept such allowances, though offered, since if he does he would have the burden of properly administering the promotional program, which in some cases would include correctly apportioning the allowances among his retailer customers and ensuring that the allowances are used for the intended purpose.[25]

Reading the Commission's opinion against the background of the Act, taken as a whole, and, more particularly, the Commission's policy position on Section 2(d), as stated in its publicly promulgated Guides for Advertising Allowances and Other Merchandising Payments and Services,[26] it is quite clear that the

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[25] A supplier has the duty under Section 2(d) to distribute allowances "on proportionally equal terms" to his competing customers and has the further duty to make sure that the allowances are used for promotional purposes. *General Foods Corp.*, 52 F.T.C. 798, 823. An inducing, direct-buying retailer, and perhaps even a noninducing retailer who simply receives allowances from a supplier, would have a similar duty in this regard, although the steps required to be taken to satisfy that obligation might differ significantly depending on the role the retailer plays in the particular promotional program. See, *e.g.*, *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92, 100 (C.A. 2). It would seem that an inducing, direct-buying retailer, such as respondent, who conceived of and initiated the entire program, might have as high a duty as the supplier himself to ensure proportionality and proper use of the allowances. That, of course, is not a question that need be resolved in the instant case. See generally FTC Guides, pars. 7, 11 (App., *infra*, pp. 43–44, 45–46); see also Rowe, 409–411.

[26] These FTC Guides, relating to compliance with Sections 2(d) and 2(e) of the Act, were adopted by the Commission on May 19, 1960, and are set out in 1 CCH Trade Reg. Rep. 6073–6079. They are based both on decisions of the courts and

Commission's approach is not properly subject to such criticisms.

In the first place, respondent erroneously assumes that Section 2(d) is satisfied only if the allowances are in every case passed on from the wholesaler to the retailer customers. That would be proper and appropriate in some instances, such as where the direct-buying retailer is given an allowance upon the condition that it perform an in-store promotion. In that case, proportional equality would be achieved by offering a similar allowance to the wholesaler upon terms requiring him to pass on an appropriate share to those of his retailer customers who will in return perform similar in-store promotions. But, in other instances, an offer limited to such an arrangement would not be appropriate, such as where the direct-buying retailer is given an allowance for advertising the avail-

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the Commission, and on the practice of the Commission in applying the requirements of Sections 2(d) and 2(e). These guides were originally developed for internal use, but were published by the Commission in 1960 and are publicly available to all interested persons. As stated in the Commission's regulations, these guides "are administrative interpretations of laws administered by the Commission for the use of the Commission's staff and guidance of businessmen in evaluating certain types of practices" (16 C.F.R. §§ 1.55–1.56). Although never reprinted in the Federal Register nor formally adopted by the Commission as rules, these guides authoritatively embody Commission practice, have been included in trade regulation manuals, and have been cited and relied upon by lower courts and commentators (see generally Rowe, 363 *et seq.*). It is thus a fair assumption that the Commission's opinion was written against the background of these published and publicly available guides. They are referred to herein as "FTC Guides", and, for convenience, are set out, in pertinent part, in the Appendix (pp. 41–48), as modified on January 31, 1967.

ability in its stores of products purchased from the supplier. In that situation, proportional equality might best be achieved by offering a similar allowance to the wholesaler upon terms requiring him to publish similar advertisements of the availability of the supplier's products in his retailer customers' stores.

Thus, although in most cases a supplier would probably desire to deal with and through a wholesaler rather than directly with the latter's retailer customers—who might be many in number and whom the supplier might not know or have any contact with—there may be situations in which it would be more feasible for the supplier to deal directly with the retailer customers rather than through the wholesaler in regard to a promotional program. Under the Commission's approach, that sort of arrangement would be permissible, so long as it was satisfactory with the particular wholesaler involved.[27] Under Commissioner Elman's suggested approach (see note 24, *supra;* R. 103–106), however, the wholesaler would be wholly bypassed, and the supplier's duty would be only to the individual, independent retailers in each case.[28] Such a bypassing of the wholesaler in each and every situation seems both unnecessary and impracticable. There are numerous kinds of promotional programs in which the wholesaler will be quite directly interested, in

[27] Indeed, Rowe suggests this method of proceeding as an alternative to making allowances directly available to the wholesaler. See Rowe, 90 (1964 Supp.).

[28] Commissioner Elman's solution for the inadequacy he found in the Commission's order was to read "customers" as including the wholesaler's retailer customers, and to require that allowances be made available to them, rather than to the wholesaler (R. 105–106).

which the supplier will desire to work through the wholesaler rather than deal with the wholesaler's many retail outlets, and in which such an arrangement would plainly be the more feasible way of proceeding. Commissioner Elman's view would foreclose this approach; the Commission's interpretation would not. Construing Section 2(d) in a manner which will allow such flexibility is desirable.

Allowances for promotional purposes are required to be given in a form which ensures their use for the purposes intended, and must be made available to all competing customers on proportionally equal terms (see note 25, *supra*). A supplier who simply makes an amount of money generally available to a wholesaler, in order to discharge his obligation under Section 2(d), would probably not be in sufficient compliance with that provision. As the FTC Guides make clear, a supplier engaged in a promotional program must do so under a plan which meets several requirements (FTC Guides, par. 6, App., *infra*, pp. 42–43). That plan must allow all types of competing customers to participate or provide some effective alternative for participation by those customers not in a position to use the basic plan (FTC Guides, par. 9, App., *infra*, pp. 44–45). An obligation rests on both supplier and customer to see that the promotional allowances provided are actually used in full solely for the intended purposes (FTC Guides, par. 11, App., *infra*, pp. 45–46). Apart from these requirements, which serve to ensure that the allowances are properly utilized, it will of course be in the supplier's interest to supervise the use of promotional allowances which are provided to whole-

salers, once it is clear that that is required by Section 2(d). Indeed, the very idea of such a program is to promote the supplier's products through an advertising scheme which will have the effect of increasing sales of the featured products to consumers.

In no event could a wholesaler lawfully retain as a "windfall" allowances provided to him by a supplier in connection with a promotional program. If such allowances are in fact pocketed by the wholesaler, without complying with the terms and conditions upon which they were granted, the *wholesaler's* action in this respect would plainly not satisfy the requirements of Section 2(d), even though the *supplier* has adequately discharged all of his statutory obligations. In such a situation, the wholesaler's acceptance and retention of such allowances could be attacked as a violation of Section 2(f) of the Act (see FTC Guides, par. 11, App., *infra,* p. 46), or, depending on the circumstances, Section 5 of the Federal Trade Commission Act.

Section 2(d) of course requires only that allowances be made "available" to customers competing in the distribution of the supplier's products. Under the Commission's construction of that section, in situations like the one here presented, the wholesaler is regarded as the "customer" competing with the direct-buying retailer. An allowance would therefore, at least initially,[29] be made available to the wholesaler, and it

[29] Conceivably, when so approached, the wholesaler may indicate to the supplier that, while desirous of having his retailer customers participate in and benefit from the proposed program, he would prefer for the supplier to deal directly with the retailers. No problem would be presented if the supplier

is within that wholesaler's power to reject it. Should this happen, it might be thought, the other intended beneficiaries of the policy underlying 2(d)—the retailer customers—would be denied participation in the promotional program without being able to decide this for themselves. Such a problem seems quite theoretical, however.

In the first place, most wholesalers will probably welcome the opportunity to participate in such a program, for it will inure to their benefit as well as that of their retailer customers—if successful, the promotion will increase the wholesaler's sales to these customers. Most wholesalers, therefore, wanting to encourage promotion of their retailer customers' products, will in all likelihood accept any worthwhile offer and see that the allowance is properly used. And if the administrative problems incident to wholesaler participation are so great as to deter a wholesaler from participation, it may well be that the offer of participation made to the wholesaler is not one made on "proportionally equal" terms. As the FTC Guides and the supporting cases make clear, the requirement that allowances be made available on proportionally equal terms places an obligation on the supplier to ensure that reasonable and feasible alternatives for participation are made available to those customers who, because of their size or nature of operation, cannot participate directly in the basic promotional plan

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chose to do so (see note 27, *supra*); if he did not, then a question would be raised as to whether the wholesaler's reluctance to participate was because the allowances were not offered by the supplier on proportionally equal terms (see the discussion *infra*, pp. 35–36).

as originally devised. Where a wholesaler determines that participation is not practicable, because the offer does not in fact provide such alternatives, the supplier's action would of course not comport with the statutory command.[30]

Nor would the burdens incident to administering participation in a promotional program appear to be generally overwhelming or insuperable for the wholesaler. Such burdens may in large measure be frequently assumed by the supplier. And whatever burdens may fall upon the wholesaler will of course be offset and compensated for by the benefits which will flow from participation in such collective and cooperative promotional endeavors. In addition, implementation of and adherence to the flexible statutory requirement of proportional equality will probably go far to overcome any wholesaler resistance to partici-

[30] Although not passing on the question, the Court in *Simplicity Pattern* noted that "the Commission has indicated a willingness to give a relatively broad scope to the standard of proportional equality under §§ 2(d) and 2(e)," citing and quoting from *Lever Bros. Co.*, 50 F.T.C. 494, 512 (360 U.S. at 61–62, n. 4). In so noting the Commission's approach in this regard, the Court at least implicitly indicated its agreement with the Commission, since the Court approvingly referred to a good faith "tailoring of services and facilities to meet the differing needs of two classes of customers * * *" as constituting the offering of benefits on proportionally equal terms (*ibid.*), there in a 2(e) context. See generally Rowe, 399–414, and, more particularly, *id.* at 403–404.

pation in such programs because of the attendant administrative burdens.[31]

Apart from these considerations, and assuming that nevertheless there may be situations in which a wholesaler would still decline to accept an offer to participate in a promotional program—although in his interest to do so and the offer is one properly made on proportionally equal terms—the presence of his wholesaler competitors, who might not be as reluctant to participate, will probably make his refusal one as to which he will promptly have some second thoughts. In other words, if his retailer customers start to turn to other wholesalers who are in a position to offer participation in a particular supplier's promotional

[31] In addition to the points already considered, respondent also suggests, as pertinent to an evaluation of the practicality of the Commission's construction of Section 2(d), the difficulty in ascertaining which retailer customers of a wholesaler actually receive a particular supplier's products when such goods have been commingled by the wholesaler with those obtained from other suppliers. But the same sort of difficulty exists when price concessions, rather than promotional allowances, are involved. Yet it is clear that, under Section 2(a) and the cases construing and applying that provision, the supplier must nevertheless price without discrimination in such a situation. See, *e.g.*, *Tri-Valley Packing Ass'n* v. *Federal Trade Commission*, 329 F. 2d 694, 698 (C.A. 9); *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43, 49–50 (C.A. 8), affirmed, 355 U.S. 411; cf. *Currin* v. *Wallace*, 306 U.S. 1, 11. Such a supposed problem can arise only where the products involved are so identical as to be essentially fungible. As under Section 2(a), the wholesaler's stock of such goods would be treated as being fungible in nature, and the particular supplier's products would be traced only so far as that stock. Retailer customers buying from that stock and selling to consumers in direct competition with a direct-buying retailer such as respondent would be eligible for and entitled to receive any allowances which are to be passed on by that wholesaler.

program as a valuable incident to their purchase of certain products, the reluctant wholesaler will be likely to reconsider.

In any event, these considerations properly relate to "hypothetical situations" which may or may not arise in complying with the Act and with Commission orders. Cf. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431. If they do arise, the Commission's rules make available procedures under which binding advisory opinions may be obtained as to whether particular programs properly comport with Section 2(d)'s requirements. 16 C.F.R. §§ 1.51–1.54, 3.26(b), (c).[32] Suppliers and wholesalers concerned about the extent of their obligations under Section 2(d) or the administrative burdens of supervising such a program can plainly turn to the Commission for assistance in this regard, as can the wholesaler unsure whether a particular offer is in fact one made on proportionally equal terms. Cf. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394.

As the foregoing discussion makes clear, the concern expressed by Commissioner Elman and the points raised by respondent can all be satisfactorily answered by a consideration of the Commission's practice and policy in administering Section 2(d) and in monitoring compliance with its orders. In any event, none of the alleged difficulties provides sufficient reason for denying to small, independent re-

[32] Under the FTC Procedures and Rules of Practice, an advisory opinion on the legality of any "proposed course of action" which a person seeks to pursue may be obtained from the Commission (16 C.F.R. §§ 1.51–1.52).

tailers and their wholesalers what protection Section 2(d) can afford. That, properly considered, is what the Commission's decision in the instant case attempts to accomplish.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed insofar as it holds that respondent's suppliers did not violate Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, by granting respondent promotional allowances not made proportionally available to wholesalers who resold to respondent's retail competitors, and the case should be remanded with instructions to restore that language in the Commission's order which would prohibit respondent from inducing and receiving promotional allowances not made available to wholesalers reselling to respondent's retail competitors.

Respectfully submitted.

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